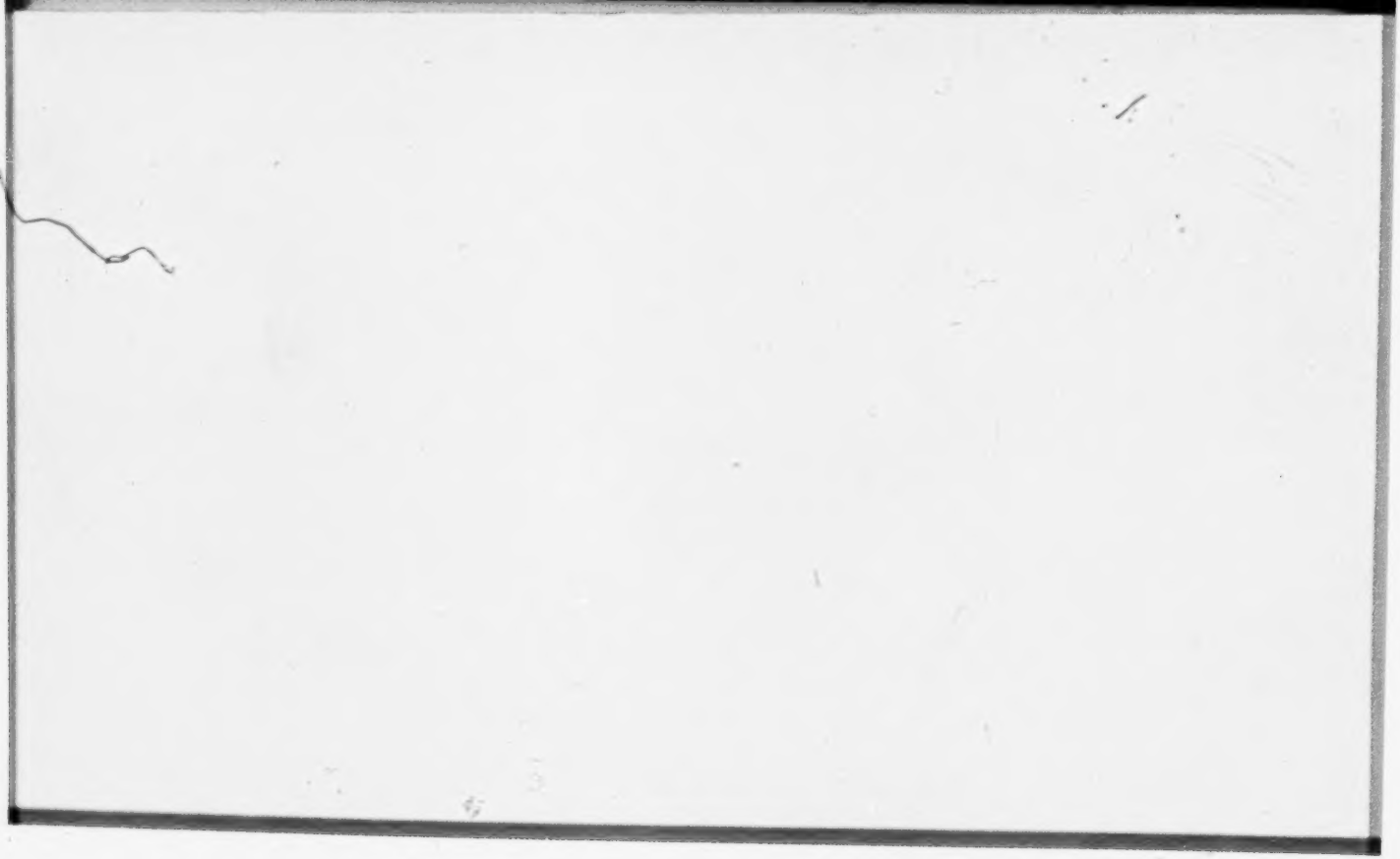


UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 8097.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety,

Plaintiffs,

R. Thomas Moore, et al.,

Intervenors,

v.

York Ice Machinery Corporation,

Defendant,

R. Thomas Moore,
Intervening Complainant-Appellant.

DOCKET ENTRIES.

July 25, 1942 Notice of Appeal filed.

July 25, 1942 Appearances of counsel entered.

Aug. 21, 1942 Stipulation extending time for filing Record to Sept. 12, 1942 and Appellants brief by Sept. 28, 1942, filed.

Aug. 21, 1942 Order extending time for filing Record to Sept. 12, 1942 and Appellants brief by Sept. 28, 1942, filed.

Sept. 14, 1942 Transcript of Record from District Court filed.

Sept. 14, 1942 Copy of Transcript of Record from District Court filed.

Sept. 23, 1942 Statement of Parts of Record to be Printed in Appendix to Appellants Brief filed.

Sept. 24, 1942 Transfer to Argument List.

Sept. 28, 1942 Brief for Appellant filed.

Sept. 28, 1942 Appendix to Appellants Brief filed.

Oct. 13, 1942 Brief for Defendant Appellee filed.

Oct. 19, 1942 Reply brief for Appellant filed.

Oct. 19, 1942 Argued—Coram: Biggs, Jones & Goodrich, *JJ.*

June 15, 1943 Opinion of the Court by Biggs, *J*, filed.

June 15, 1943 Order Affirming Judgment each party to bear his own costs filed.

June 15, 1943 Copy of Opinion to Richard J. Mackey.

July 2, 1943 Order extending time for filing petition for Rehearing five days filed.

July 2, 1943 Petition for Rehearing filed.

July 15, 1943 Order Denying Petition for Rehearing filed.

July 21, 1943 Mandate issued.

Nov. 27, 1944 Petition for Leave to file Bill of Review in the U. S. District Court of Delaware filed.

Dec. 2, 1944 Order to Show Cause Returnable Dec. 8, 1944 filed.

Dec. 7, 1944 Answer of York Corp. (Formerly York Ice Machinery Corp. Defendant) to Order to Show Cause filed.

Dec. 7, 1944 Affidavit of John F. Lebor in support of Answer filed.

Dec. 8, 1944 Reply Affidavit filed.

Dec. 8, 1944 Heard on Petition for Bill of Review, Coram; Biggs, Jones & Goodrich, *JJ.*

Dec. 15, 1944 Affidavit of George D. Hornstein filed.

Dec. 19, 1944 Reply of Defendant to Affidavit of George D. Hornstein filed.

Dec. 29, 1944 Opinion *Sur* Motion for Leave to File a Bill of Review by Biggs, *J.* filed.

Dec. 29, 1944 Order Denying Petition to File a Bill of Review and Discharging Rule to Show Cause of Dec. 2, 1944 filed.

Dec. 29, 1944 Copy of Opinion *Sur* Motion etc to William H. Foulk.

Jan. 11, 1945 Petition for Rehearing of Motion to File a Bill of Review filed.

Jan. 12, 1945 Memorandum in Support of Motion for Reargument filed.

Jan. 18, 1945 Memorandum in Opposition to Motion for Reargument filed.

Feb. 19, 1945 Order Denying Petition for Rehearing of Motion to File a Bill of Review filed.

Feb. 20, 1945 Copies of Order Denying Petition for Rehearing to Counsel.

April 3, 1945 Certified Copies of Proceedings in Petition for Leave to file a bill of Review to S. M. Heilbron.

May 21, 1945 Certificate of Filing Petition for Certiorari in the Supreme Court filed.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Civil Action No. 8097.

October Term, 1942.

Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety,

Plaintiffs,

R. Thomas Moore,

Intervenor-Appellant,

v.

York Ice Machinery Corporation,

Defendant-Appellee.

REPLY TO AFFIDAVIT OF GEORGE D. HORNSTEIN.

In the affidavit of Mr. Hornstein he quotes from the statement of Mr. Justice Black in reference to "tampering with the administration of justice". With that statement we are in full accord, and bearing it in mind, we desire to make certain comments on the sworn statements in Mr. Hornstein's affidavit.

THE APPRAISAL TESTIMONY.

The testimony before the appraisers was of two general types; one was *factual* testimony and the other was *opinion* testimony. The opinion testimony was that of

three experts in their field, each of whom was asked to express an opinion as to the fair value of the preferred stock on a specified date. They gave their opinions, together with their reasons for their respective conclusions, and all three explained at considerable length the factors they took into consideration in reaching their respective conclusions. In cross-examination they were asked for their views and opinions as to values of assets of the corporation, as to future earnings, as to future corporate taxes, etc. Their opinions as to the value of the stock were entitled to only such weight as the appraisers thought the opinions deserved, in the light of the reasons given by the experts in support of their respective conclusions, and in the light also of all other testimony then before the appraisers, *which included the evidence that had been before Judge Watson and which was then before the appraisers on the subject of the values of the corporation's fixed assets.* The references on page 4 of Mr. Hornstein's affidavit to answers given by the experts to single questions put to them on cross-examination give an utterly inadequate, and therefore misleading, impression of the testimony of those experts.

Mr. Hornstein also says:

> "Assuming the honesty of the defendant's most recent position—that they believe to be true the testimony of the experts presented before the appraisers (p. 5 of their answer on this motion) * * *."

This is a reckless, or at least careless, statement. Our Answer does *not* state that we "believe to be true the testimony of the experts presented before the appraisers" * * *. Our Answer asserts that our "factual" testimony was true. The exact language is:

> "To the extent to which factual testimony was presented to the Appraisers on behalf of respondent, that testimony was true to the best of respondent's then and present knowledge, information and belief."

Manifestly, the testimony of the experts was *opinion* testimony, pure and simple. The opinion testimony that was given consisted of bona fide opinions of competent experts of integrity.

Speaking of earnings, the Hornstein affidavit says (p. 4):

> "* * * the testimony submitted by the defendant in the injunction suit was based upon prospective earnings almost double that sworn to by defendant's witness in the appraisal proceeding."

This reference to testimony in the appraisal proceedings evidently is to testimony of one of the experts, Mr. Bancroft, who gave his estimate of future net earnings as $490,000.00 per annum *after* taxes. The above quoted language from the Hornstein affidavit conveys the impression that Mr. Bancroft's estimate was the only attempted forecast before the appraisers of future earnings. The fact, however, is that not only did the other experts give higher estimates but the appraisers had before them the estimate given by Day & Zimmerman in the injunction suit of annual net earnings of from $1,000,000.00 to $2,000,000.00 before *interest and* Federal taxes. Since the interest charges at that time amounted to more than $300,000.00, this would be equivalent to an estimate of net before Federal income and excess profit taxes of between $700,000.00 and $1,700,000.00. The estimate of future net earnings given to the appraisers by the only officer of the Company who gave any testimony on that subject before the appraisers is consistent to a marked degree with the testimony on that subject as given in the injunction suit because Mr. Lebor, the present Treasurer of the Company, testified to the appraisers that in his opinion the future earnings would be about $1,500,000.00 before Federal income and excess profit taxes. His testimony on this subject appears on pages 545 and 546 before the appraisers and is as follows:

"By Mr. Kann:

* * * * * * *

RQ. On an amount of that nature what would be the profit before taxes, after all charges except taxes?

A. That I am not prepared to give an opinion on. We hope that we are going to improve the Company's profits.

RQ. You have worked out no percentages as to what the margins would probably be if the volume were on that basis, but have you any personal opinion?

A. I can give you this: in my own responsibility, which is in the field of financial management, I have had to do some thinking on that, and I have personally used a twenty million, 7½ per cent margin of profit, which is better than we have done before. *It is higher than I heard Mr. Bracken testify to this morning.*

RQ. That would be about a million and a half dollars. That would be before taxes?

A. Before taxes? No, after all taxes except taxes based upon income—that is, Social Security, and all that. Everything except income and excess profit taxes."

Thus, the testimony of Lebor, the only officer of defendant who gave any testimony on the subject before the appraisers, not to speak of the testimony of the other two experts, shows that Mr. Hornstein was not justified in what he says in his affidavit on this subject.

We have italicized a portion of the above quotation from the testimony to emphasize the essentially opinion nature of the testimony given by our experts, and to show that on this subject of future earnings Mr. Lebor not only gave a higher estimate than one of the experts who preceded him, but mentioned specifically that his estimate was higher.

The Hornstein affidavit also refers to the testimony of Mr. Bancroft as giving "the assets of the corporation

* * * a value of not more than $4,000,000.00." That Mr. Bancroft was giving his opinion of the value of the shares of *stock*, and not of *assets*, appears from his following testimony on cross-examination (p. 512):

> "X. Assuming that that was the fair value, and taking a value of $3,800,000, you mean to say that the net worth of this Company was not more than four million?
>
> "A. I am talking about the value of the stocks of the Company, not the net worth."

Mr. Hornstein's affidavit also says, regarding the value of the assets of the corporation, that "another of their experts, more specific than the first, placed a value of exactly $3,944,000.00" (pp. 519-520).

Again, Mr. Hornstein is not frank, since Mr. Bracken was discussing the valuation of the preferred stock, not the valuation of the assets, as appears from his testimony (p. 520) as follows:

> "X. In your opinion, in June, 1942, a fair offer for this Company would have been four million dollars. Is that right?
>
> A. Well, I said $3,944,000.
>
> X. Close enough. Approximately four million dollars would have been a fair appraisal for the purchase of this whole Company, lock, stock and barrel? That is your opinion?
>
> A. I refuse to say whether that is for purchase or not. I say that is my valuation of the preferred stock, and I give no equity for the common stock other than a very speculative value."

All three experts in the appraisal proceeding testified that they took asset value as well as other factors into consideration in determining the value of this stock, but all three agreed in stating that asset value was not a major

factor in valuing the stock. All three experts agreed that, if assets alone were considered, the stock would have a value in excess of its call price plus accrued dividends, but all three experts were also in agreement that the stock could not properly be valued on that basis. By way of illustration, we quote the following from the testimony of one of the experts, Mr. Naess, on this subject (pp. 277-278, 280):

> "The sixth method of approach is asset value. The asset value of the preferred stock of York Ice Machinery Corporation was in excess of par value plus arrears. The book value as of September 30, 1942, was approximately 213.50. Par value plus arrears was 205—the call price plus arrears was 205. * * * That is a very small coverage on an asset basis for preferred stock. However, in accordance with the Day & Zimmerman report there was a substantially greater value on appraised reproduction new after depreciation, although that report does not indicate the real value for the property, but I have to make an allowance somewhat for that so I would say that the asset value of this preferred stock on whatever basis you wish to put it covers the call price plus arrears. * * * So that, in my opinion, assets are not of any great importance in determining the value of the stock, and that holds because after all the purpose of assets is to have earning power and if the Company does not have earning power it does not have earning power however great its assets may be."

THE QUESTIONS INVOLVED IN THE INJUNCTION SUIT AND IN THE APPRAISAL PROCEEDING WERE NOT THE SAME.

In view of certain questions asked by Judge Biggs at the oral argument, and since the Hornstein affidavit makes

ect that the questions involved in an argument to the ef the same as in the appraisal pro- the injunction suit were omit the following supplement to ceeding, we beg to su- ief filed at the oral argument: what is stated in our b

e the District Court was to deter- The problem befor- er plan was fair; or, more accu- mine whether the merg- ther the merger plan was so mani- rately, to determine wh- uld be enjoined because construc- festly unfair that it sh tively fraudulent.

It should not be ov- rlooked that in the injunction suit the court was not deali- g with a reorganization of an in- solvent corporation un- er the Bankruptcy statute, where the court is charged by the statute with a duty of deter- mining the fairness of the plan, and in connection with which the court may be required to make findings of values of assets in order to determine what participation, if any, holders of corporate securities are entitled to have in the plan. On the contrary this was a statutory proceeding under Section 59 of the Delaware statute, where the man- agement of the corpora- ion, in the first place, and there- after the stockholders b- y a two-thirds vote, decide, in the manner prescribed by t- e statute, for or against the adop- tion of the plan. Unde- the statute the vote of the com- mon stock was required for the adoption of this plan be- cause the common stock controlled this corporation; and consequently, as point- d out in the North American Cement Corporation cas- e cited on our previous brief, par- ticipation in the plan b- the common stock would reason- ably be expected as a practical matter. In such a case the function of the cou- t, in contrast with its function in insolvency cases, is to d- termine merely whether the man- agement and the statut- ory majority abused their power and discretion. In deci- ing this question the court viewed all pertinent facts *as a whole*. Value of assets was an element, but only as pa- t of a broad picture, in the con- sideration of the whole determine or adjudicate of which the objective was not to the value of assets. The District

Court had before it not only the balance sheet of September 30, 1940 (upon which plaintiff relied), which showed a deficit for the common stock, but the Court also had the balance sheet of September 30, 1941, which had come out prior to the hearing before Judge Watson, and which showed an equity for the common stock as the result of earnings for the year. The plan before the Court showed additional benefits conferred upon the holders of the Preferred Stock which had an important bearing upon whether the Preferred Stock was treated unfairly by the plan. Upon a consideration (necessarily) of the whole picture, the District Court decided that the plan was not unfair to the Preferred Stock and that the plan would not be enjoined. Even if Judge Watson had made a finding of the value of the *assets* (which he did not) in connection with his decision as to whether the plan was or was not unfair, this would not determine the value to be placed upon the *stock* (for purposes of payment) in appraisal proceedings. One reason is that, in the injunction suit, the benefits expected to be obtained from the plan occupied an essential place, whereas in the appraisal proceeding the benefits expected to be derived from the plan are *expressly* excluded by Section 61 of the Delaware Corporation Law. Another reason is that the *sole* question before the Appraisers was the value of the *stock*, and that value was based upon factors in addition to asset values. Indeed, it is a well known and generally accepted view, to which all three of our experts testified, that values of fixed assets are not as important as other factors in determining the value of stock of a corporation. The Hornstein affidavit states that the proceeding before the Appraisers "should have been a mere formality", presumably because of evidence in the injunction proceeding as to values of assets. This is utterly absurd, not only for the reasons we have just stated, and because the statute commits to the appraisers the power and duty to value the stock, unaffected by any benefits expected from the merger, but also because

a decision by the Appraisers based solely upon asset values would have been invalid under the decision of Chancellor Wolcott in *Chicago Corporation* v. *Munds*, 20 Del. Ch. 142, 172 Atl. 452. In that case the corporation was an investment company whose assets consisted principally of cash and marketable securities. The Appraisers based their valuation solely upon the market price of the stock, which was traded in on the Chicago Stock Exchange. Because of the nature of the corporation's assets it was contended that the stock should have been valued on the basis of its assets. The Chancellor held that the apraisers were in error in using the market price as the sole test, and also held that it would have been improper to use asset values as the sole test, and he concluded his opinion as follows:

> "There is no need at this stage of the case for me to enter upon a discussion of the sort of considerations which should be taken into account in the valuing the defendants' stock. Market value undoubtedly is a pertinent consideration. So is net asset value. Neither, however, deserves necessarily to be accepted as exclusive. Those are the only two standards of measure that the respective parties to this cause have insisted upon as governing, and I shall abstain from embarking upon a general discussion touching other possible elements that might under varying circumstances be taken into account."

The views expressed by the experts in the appraisal proceeding with respect to the weight to be given asset values in determining the value of the stock are consistent with the above cited case because the cited case was one where the assets could readily and quickly have been reduced to cash in the open market and yet Chancellor Wolcott held, even in that case, that it was improper to take asset values alone as the determining factor.

In view of the decision in the Chicago Corporation case, it is apparent how unsound is the statement in the Hornstein affidavit to the effect that the "appraisal proceeding should have been a mere formality." That is but another way of asserting that the stock should have been valued on the basis of assets alone.

Respectfully submitted.

GEORGE S. MUNSON,
AARON FINGER,
Attorneys for Defendant.

DECEMBER 18, 1944.

Office - Supreme Court, U. S.
FILED
JUN 9 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944

No. 1282

CHARLES A. HOTTENSTEIN, CARL SCHMOYER, and ANDREW FEKETY,

Petitioners,

—*vs.*—

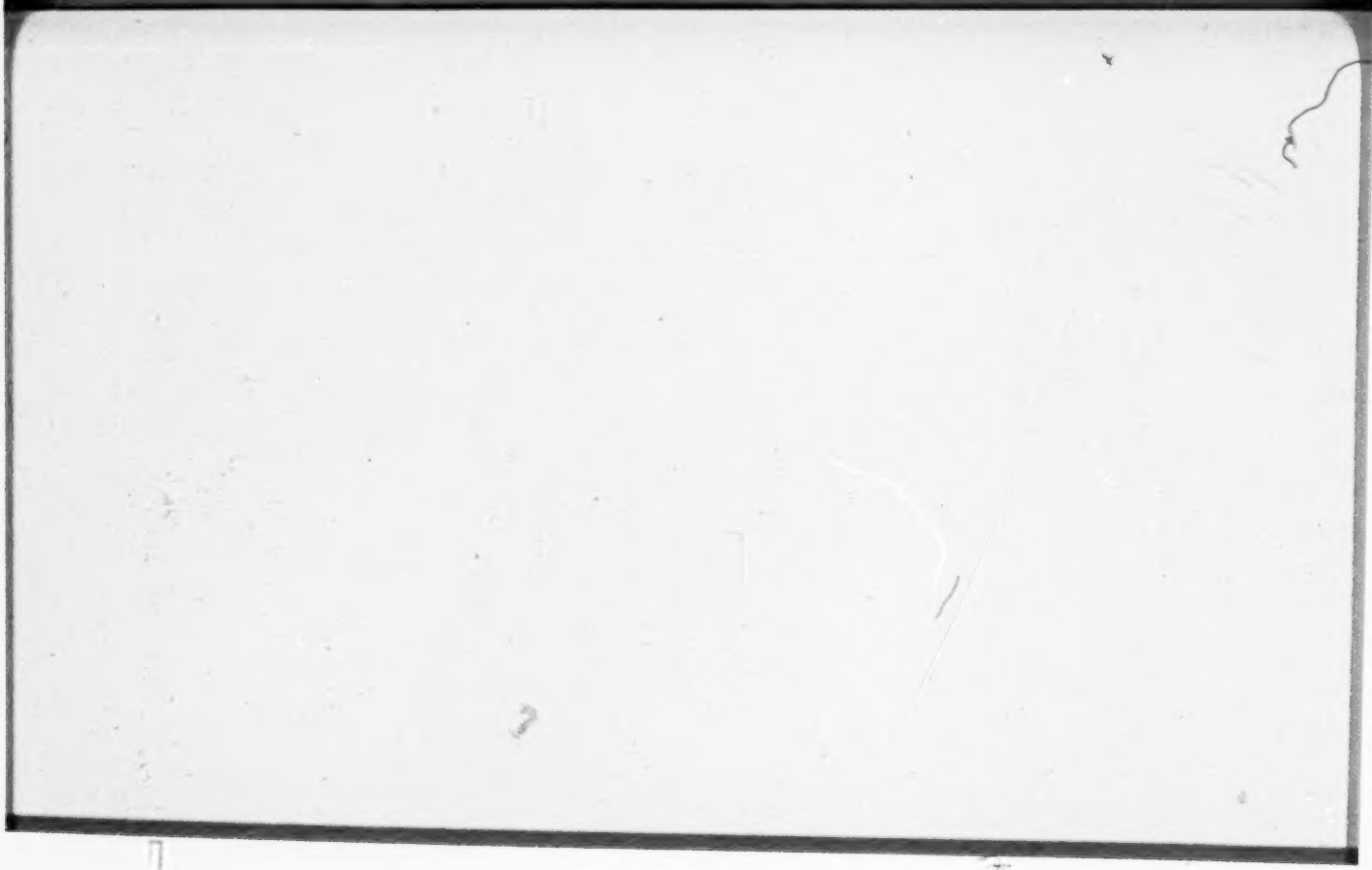
YORK ICE MACHINERY CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO CORRECTING DIMINUTION OF THE RECORD

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

June 7, 1945.



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BRIEF IN OPPOSITION TO CORRECTING DIMINUTION OF THE RECORD

Petitioners interpose no objection to the Court's directing that the Record be supplemented, if the Court feels that the alleged omissions would prejudice the Respondent.

The "Reply of Defendant to Affidavit of George D. Hornstein" was a brief, not an affidavit. Respondent wishes this paper added to the Record. It was not originally included because the Clerk of the Circuit Court of Appeals for the Third Circuit specifically stated that in that Circuit it is not the practice to certify as part of the Record briefs of counsel. It will be noted that the Docket Entries refer to other briefs—on both sides—which Respondent does not suggest should be part of the Record.

The brief which Respondent wishes added to the Record was a "Reply" to the affidavit of George D. Hornstein, appearing *amicus curiae* by leave of court. Respondent had

attempted to divert attention of the Circuit Court, as it does of this Court, from the actual issue by urging that petitioners are not in court with clean hands. Mr. Hornstein who was present in court on behalf of other stockholders, stated orally to the court and by his affidavit documented his statement *and put on the record proof* that, in addition to the three petitioners, a number of *substantial stockholders of 10 years' standing*—stockholders long before the recapitalization was proposed—*are by stipulation equally affected* by the reopening of the injunction proceeding (R. 63, 76). Altogether 66 other stockholders (*whose names appear in the Record*) are directly affected by the decision on this application (R. 60-61, 75-77).

To this part of Mr. Hornstein's affidavit, Respondent's Reply Brief did not advert. All of the "Reply" is utterly immaterial to the issue before this Court. This Court is not asked to pass upon the merits but to rule as a matter of law upon the correctness of the decision of the Circuit Court of Appeals which after stating that the allegations of fraud *would* justify a bill of review nevertheless held itself barred from doing so because it "would be a futility" (R. 80-82)

Should this Court determine to add the "Reply" to the Record, it is respectfully asked to correlate with it other facts already appearing in the Record herein. For example between the two extracts from the Appraisal Testimony, quoted at page 7a of Respondent's Appendix, appeared the following (R. 70):

> "X. * * * Have you any idea what this Company was worth as a going concern as of June 29, 1942?
>
> "A. Yes, I have a very good idea.
>
> "X. As a going concern, what do you say this Company was worth?
>
> "A. I would say $3,944,000, approximately" (pp. 519-20).

The "Reply" (Appendix, p. 9a)—being a brief to the Circuit Court of Appeals—refers to "certain questions asked by Judge Biggs at the oral argument". If this Court accepts Respondent's "Reply" Brief as part of the record herein, it should permit a statement as to what Judge Biggs did ask on oral argument. He asked Mr. Finger, arguing for respondent, how his (Mr. Finger's) present denial that on the prior appeal respondent had urged that the corporation's assets were worth a minimum of $10,000,000 could be reconciled with the written opinions of both the District Court and the Circuit Court of Appeals at that time. Judge Biggs' question remains unanswered.

The proposed supplement to the Record has nothing to do with the issue before this Court. In Respondent's Brief in Opposition to the Petition for Writ of Certiorari *not a word* will be found on the legal issue before this Court until the last page and a half of the Brief (pp. 17-18). The Court is invited to compare those two pages, unsupported by reason or authorities, with the reasoned, documented Argument for the Petitioners.

Respondent's Brief reaches its climax in concluding that there is no public interest at stake; "it is merely one of the disputes that *frequently* follow merger proceedings between corporations." The "merger" in this case was conceded by the unanimous Circuit Court of Appeals to be merely a "'paper' merger" or subterfuge to effect recapitalization. If one now *frequently* finds false testimony at merger injunction proceedings, repudiated brazenly in subsequent appraisal proceedings, it is high time that this Court take a position that such conduct is not beyond the power of a Court to correct.

Respectfully submitted,

ARTHUR GARFIELD HAYS,
GEORGE D. HORNSTEIN,
Counsel for Petitioners.

June 7, 1945.